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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

11 UNITED STATES OF AMERICA,

12 Plaintiff,

13 || v

14 STEVEN LEE VARGEM

Defendant

CASE NO.: CR 10-00729 JW

**DEFENDANT VARGEM'S REPLY
MEMORANDUM IN SUPPORT OF
MOTION TO SUPPRESS**

Date: April 25, 2011
Time: 1:30 p.m.
Court: Hon. James Ware

Defendant VARGEM's Motion to Suppress is premised on attacking the warrant itself, the affidavit supporting the warrant, and the magistrate's unreasonable finding of probable cause to believe a crime had been committed.

The heart of VARGEM’s challenge to the warrant is California’s criminalization of “ownership” of firearms for persons subject to *ex parte* temporary restraining orders. To the extent that California law criminalizes ownership of ANY property based on *ex parte* orders, that statute is unconstitutional.

25 Aside from the obvious due process issues of ordering an immediate
26 sale/transfer/divestment of valuable property without a hearing; the requirement –
27 even with notice – of an immediate sale/transfer/divestment is an impossible task
28 given the terms of the Domestic Violence Restraining Order itself. Guns can only

1 be bought/sold through licensed dealers in California. CA Penal Code § 12072. This
 2 means they have to be transported to the dealer to conduct the sale. Imposing that
 3 duty on the gun owner in the same restraining order that prohibits possession of
 4 guns – and in this case, an order that even prohibits temporal proximity to the guns
 5 located in the home – defies logic and reason and violates due process.

6 Nor could VARGEM phone his wife to conduct the sale, as the *ex parte* order
 7 also prohibited VARGEM from contacting his wife by any means.

8 This is where I would expect the Government to state the obvious and point
 9 out that VARGEM was arrested on the day the warrant was issued for violating the
 10 restraining order and that he later entered a plea to that violation. But since
 11 Fourth Amendment cases are adjudicated under a “totality of the circumstances”
 12 regime, it is necessary to delve further into the facts. *Illinois v. Gates*, 462 U.S. 213
 13 (1983).

14 In his Search Warrant Affidavit, Officer Tuell says that he told VARGEM: “
 15 ... *he (Vargem) had the responsibility to surrender all firearms.*” [page 3, lines 24-25]
 16 Why is this relevant?

17 1. Officer Tuell DOES NOT state in his Search Warrant Affidavit that he
 18 had any facts to suggest that VARGEM was in current possession of a
 19 firearm or that VARGEM was attempting to purchase or receive a
 20 firearm.

21 2. The whole basis for the probable cause finding is that VARGEM had
 22 guns registered to him at his home and that VARGEM had not
 23 surrendered (or sold?) those firearms after being served with the
 24 EPRO.¹

25 3. Even if we assume that VARGEM was properly served on June 22,

27 28 ¹ The government’s position appears to be that evidence of registration of guns (as an
 indicia of ownership) – plus – evidence of being subject to a restraining order – equals –
 probable cause to believe a crime has been (or is about to be) committed.

- 1 2010 with the EPRO issued on June 19, 2010;
- 2 4. We also know that the EPRO form does not comply with California law
3 in that it does not warn the restrained party that they are under an
4 affirmative duty to surrender their firearms (the form only states that
5 the restrained party cannot own, possess, purchase, receive or attempt
6 to purchase or receive a firearm);
- 7 5. Nor does the form itself instruct the gun owner how to surrender
8 firearms in a safe and lawful manner (that is why Santa Clara County
9 developed local form FM-1047, which we know was NOT served on
10 VARGEM along with the EPRO);
- 11 6. That means that the first and only notice/commandment VARGEM
12 received that he had a duty to surrender his firearms was given to him
13 by Officer Tuell on June 24, 2010 at 1:29 p.m.;
- 14 7. By 3:00 p.m. that same day, Officer Tuell was swearing out his
15 warrant;
- 16 8. And by 4:00 p.m. Officer Tuell was executing his warrant.
- 17 9. But Family Code § 6389(c)(2) gives the restrained gun owner 24 hours
18 to surrender his guns upon being given notice of his duty to surrender
19 them;
- 20 10. There is no evidence that the officer who served VARGEM with the
21 EPRO made an immediate request that VARGEM surrender his
22 firearms at the time of service (how could he, VARGEM was served
23 with the EPRO as part of the arrest and booking process at the police
24 station after he surrendered himself to the police);
- 25 11. That means that Officer Tuell's June 24, 2010 notice to VARGEM at
26 1:29 p.m. was the first and only notice that VARGEM was given that
27 he had an affirmative duty to surrender his guns.
- 28 12. Which means:

- 1 a. even with unconstitutional state statutes that criminalize
2 “ownership” of firearms after service of an *ex parte* restraining
3 order;
 - 4 b. even with flawed Judicial Council Forms that omit critical
5 language;
 - 6 c. and even with constitutionally suspect verbal notice;
 - 7 d. the 24 hour clock for VARGEM to self-surrender (or sell) his
8 firearms would not expire until 1:29 p.m. on June 25, 2010.
- 9 13. Yet Judge Teilh was issuing a warrant, at 3:00 p.m. on June 24, 2010,
10 based on probable cause to believe VARGEM had not surrendered his
11 firearms.
- 12 14. In other words, giving the Government every possible benefit of the
13 doubt, it should still be impossible for a judge to make a finding of
14 probable cause that VARGEM had violated his duty to surrender
15 firearms within 24 hours of notice of that duty.
- 16 15. It had only been a mere 90 minutes since VARGEM received
17 constructive verbal notice of that duty from Officer Tuell.

18 Moreover, Officer Tuell does not even allege a violation (or attempted
19 violation) of the prohibited person statute – CA Penal Code § 12021. Instead, the
20 affidavit and warrant cite two statutes which purport to bootstrap a *legislative*
21 finding of probable cause – CA Penal Code § 1524(a)(9) and § 12028.5. These
22 statutes have their own limitations regarding firearms seized (i.e., in plain site or
23 subject to a consensual search) at the scene of a domestic violence incident.
- 24 The government’s argument that the VARGEM home was still the scene of a
25 domestic violence incident five (5) days after the alleged assault occurred, and after
26 VARGEM was forbidden to return to the house by the EPRO, is not supported by
27 common sense or by a citation to any statute or case law that a scene of domestic
28 violence remains a scene of domestic violence in perpetuity.

1 The government relies on the case of *People v. Williams*, 170 Cal.App.4th 587
 2 (2009)² for two contentions: (1) that VARGEM was in violation of the EPRO even if
 3 his wife co-owned the guns and/or (2) that VARGEM was in constructive possession
 4 of firearms because he alone had the combination to the safes where the guns were
 5 located. This reliance is misplaced.

6 The whole point of securing firearms at the scene of a domestic violence
 7 incident (CA Penal Code § 12028.5) is to keep guns away from the restrained party
 8 to insure the safety of the victim and officers present at the scene. If the victim co-
 9 owns the guns and needs them to exercise her own right of self-defense, by what
 10 power does the government claim it can deprive the victim of that right by taking
 11 guns lawfully owned by her? This is where the government's interpretation of CA
 12 Penal Code § 1524(a)(9) and § 12028.5 would violate Mrs. Vargem's rights under the
 13 Second Amendment. *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) and
 14 *McDonald v. City of Chicago*, 177 L. Ed. 2d 894 (2010).

15 Furthermore:

- 16 1. Even if Mrs. Vargem did not know the combinations to the safes, she had just
 17 as much right as Mr. VARGEM to hire a locksmith to open and re-key the
 18 safes.
- 19 2. There is nothing in the record to indicate that Mrs. Vargem wanted the guns
 20 removed from the house.
- 21 3. The full quote from *Williams* at 625 is: "*Conviction is not precluded ... if the*
 22 *defendant's right to exercise dominion and control over the place where the*
 23 *contraband was located is shared with another. [Citation.]*" (*People v. Valerio*
 24 (1970) 13 Cal.App.3d 912, 921 [92 Cal. Rptr. 82].)
- 25 4. VARGEM did not have the **right** to exercise dominion and control over the
 26 place where the "contraband" was located. He was subject to an EPRO that

28 ² The citation in the Government's brief is wrong in that it fails to identify the Cal.App.
 Reporter as the 4th Edition.

1 had temporarily suspended his dominion and control over the house where
2 the guns were located. The fact that he was arrested for violating the EPRO
3 doesn't change the fact that he had no right to be there. This is the major
4 distinction between *Williams* and this case. The defendant in *Williams* had
5 the right to occupy the house, common areas and the room where the
6 guns/drugs were located at the time of the search. VARGEM didn't have that
7 right to occupy his home after being served with the (defective) EPRO.

8 5. Furthermore, the *Williams* Court's analysis of possession offenses dealt with
9 possession of guns (by a convicted felon) and possession of illegal drugs. See
10 *Williams'* reference to *People v. Montero*, 155 Cal.App.4th 1170 (2007).

11 a. First, VARGEM was not a convicted felon. The prohibition on him
12 controlling firearms was based on an *ex parte* order that was defective
13 regarding notice of his duties to surrender the firearms at this house.

14 b. Second, firearms are not contraband in the same way illegal drugs are.
15 The illegal conduct associated with possession of a firearm is
16 predicated on the status of the convict (or restrained party), not on the
17 status of the gun.

18 To be clear (again), VARGEM does not challenge the power of California to
19 suspend his right to possess or purchase firearms on the basis of an *ex parte*
20 restraining order. Separating a gun owner from his guns while an allegation of
21 domestic violence is pending – to protect spouses, children and domestic partners –
22 probably meets any test of constitutional scrutiny, especially since the suspension of
23 rights is temporary and provisions are made for expedited hearings.

24 Furthermore, after a hearing, and if a permanent restraining order is issued,
25 an order to sell the guns, in a manner intended to preserve their economic value,
26 also probably passes constitutional muster. The Government is correct when they
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1 point out that this is NOT a Second Amendment case³. But firearms enjoy
2 constitutional status as both the means of exercising the “right to keep and bear
3 arms” under the Second Amendment; and for purposes of this motion, they enjoy a
4 status as property – subject to due process considerations – under the Fifth and
5 Fourteenth Amendments.

To the extent that VARGEM's firearms were located at his home, and to the extent that the *ex parte* order prohibited him from entering that home and/or approaching within 300 yards of that home – the public safety objective of separating a gun owner from his guns while a domestic violence allegation is pending is met.

11 Criminalizing “ownership” while an *ex parte* temporary restraining order is
12 pending is both irrational and unconstitutional. And since that is what formed
13 basis of the warrant’s finding of probable cause to believe a crime had been
14 committed, the warrant is invalid.

Finally, the government’s argument that the defective EPRO does not vitiate probable cause is without merit. VARGEM is not contending that he was not subject to an order that he stay away from his wife, or stay 300 yards away from his own home. There is no ambiguity or lack of notice regarding the “kick-out” and “stay-away” orders. The ambiguity in the EPRO – which rises to the level of an unconstitutional due process violation – is solely with respect to the lack of notice that VARGEM was under an affirmative “duty to surrender” firearms, rather than a duty to merely refrain from possessing, purchasing and/or receiving firearms.

Conclusion

24 Officer Tuell's mis-statements about VARGEM's violation of a known duty to
25 surrender firearms, that were made to the magistrate in his effort to secure a

³ Except to the extent that VARGEM's wife had both a Second Amendment right to these community property firearms for her own protection in addition to her own proprietary interest in the guns as community property.

1 warrant, were reckless and careless because they were so easily verified as false by
 2 merely reading the standard form (Judicial Council) EPRO.

3 Furthermore, the magistrate failed in his duty of due diligence by neglecting
 4 to inquire about the nature of the EPRO and its notices (or lack thereof) regarding
 5 firearm relinquishment.

6 Furthermore, the deficiencies on the face of the EPRO and the interplay of
 7 impossible duties (even if the EPRO contained the legally required notices to
 8 surrender) imposed upon a restrained gun owner were easily ascertained facts
 9 known to both Officer Tuell and the magistrate. It should have been readily
 10 apparent to Judge Teilh and Officer Tuell that an EPRO (even one that complies
 11 with the law) that imposes simultaneous, mutually exclusive, legally impossible,
 12 conflicting duties on someone cannot support a finding of probable cause to believe
 13 the EPRO has been violated. These conflicting duties only arise within the context
 14 of the criminalization of “ownership” of firearms⁴ for someone subject to *ex parte*
 15 restraining orders. And since Officer Tuell did not allege in his Warrant Affidavit
 16 that VARGEM was in possession or attempting to gain possession, was purchasing
 17 or attempting to purchase or was receiving or attempting to receive firearms, the
 18 warrant was improperly issued and the *U.S. v. Leon*, 468 U.S. 897 (1983) exceptions
 19 do not apply.

20 The government’s failure to rebut these arguments dooms their opposition,
 21 leaving this Court free to order the suppression of the weapon at issue due to
 22 violations of the Defendant’s Fourth Amendment right to be free from unreasonable
 23 search and seizure.

24 Respectfully Submitted on April 13, 2011.

25

26 /s/ Donald Kilmer
 27 Attorney for Defendant VARGEM

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 4 Which VARGEM contends is unconstitutional on its face.